Supreme Court, U. S.
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No. 75-1629

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANTHONY FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that a prosecution witness testified falsely at his trial and that the court erred in refusing the jurors' request for a copy of the trial transcript.

After a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted in December 1962 of interstate fraud and conspiracy, in violation of 18 U.S.C. 2314 and 371. He was sentenced to imprisonment for 11 years and 11 months. The court of appeals affirmed the convictions on the substantive counts (329 F. 2d 889),[1] and this Court denied certiorari (379 U.S. 832).

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[1]The court of appeals reversed petitioner's conspiracy conviction on the ground that the government had proved several conspiracies instead of the single conspiracy charged in the indictment.

Petitioner initiated the present proceeding for a writ of error *corum nobis* in 1974, contending that a prosecution witness testified falsely at his trial and that the court erred in refusing the jurors' request for a copy of the trial transcript. The district court denied the petition, and the court of appeals affirmed on September 4, 1975 (Pet. App.).

Even assuming the availability of a writ of error *corum nobis* to deal with matters such as those alleged by petitioner (but see *United States* v. *Morgan*, 346 U.S. 502, 512), he is not entitled to the relief that he seeks. Petitioner has challenged his conviction in four motions for a new trial and in a motion filed pursuant to 28 U.S.C. 2255, all of which have been denied. In connection with his third motion for a new trial, he submitted an affidavit from a prosecution witness in which the witness stated that he had testified falsely at trial (see Pet. App. 1).

At the hearing on the motion, however, the witness recanted the statements made in the affidavit and petitioner dismissed his appeal from the district court's denial of the motion. Petitioner again presented the affidavit in support of his fourth motion for a new trial. The motion was denied and the court of appeals affirmed (see Pet. App. 1). Petitioner has not here presented any new evidence warranting relitigation of this issue. See *Sanders* v. *United States*, 373 U.S. 1, 15-16.

With respect to petitioner's contention that the trial court erred in refusing the jury's request for a copy of the trial transcript, the court of appeals correctly concluded that "[t]he trial judge has a large area of discretion in handling such requests and no abuse of that discretion has been shown" (Pet. App. 2, citations omitted).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.